Supreme Court, U.S.
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No. 02-3-01037

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2002

GERALD WRIGHT,

Petitioner-Appellant,

v.

STATE OF GEORGIA,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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45 pp

QUESTION PRESENTED

1. Does the Fourth Amendment require law enforcement officials who take a suspect into custody at a private residence to obtain a warrant to seize and search the suspect's vehicle that is properly parked at that private residence?

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CITATIONS TO THE RECORD

All citations to the record will be from Wright v. State, 276 Ga. 454 (2003).

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October Term, 2002

GERALD WRIGHT,

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v.

STATE OF GEORGIA,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner Gerald Wright respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATIONS TO OPINIONS BELOW

On October 9, 2000, the Petitioner was indicted on two counts of

malice murder, two counts of felony murder in the commission of aggravated assault, two counts of aggravated assault, one count of possession of a firearm during the commission of a felony, and one count of concealing the death of another. The Petitioner was tried before a jury on January 29, 2001 through February 6, 2001 and was found guilty on all counts. On February 6, 2001, the trial court sentenced the Petitioner to two consecutive terms of life in prison for the malice murders, to a consecutive term of five years in prison for possession of a firearm during the commission of a felony, and a term of five years in prison for concealing the death of another, to be served concurrently with the two life terms. The aggravated assault counts merged with the felony murder counts, which stood vacated by operation of law. See Malcolm v. State, 263 Ga. 369, 371-374 (1993). The Petitioner's motion for new trial was denied on March 7, 2002. The Petitioner appealed his convictions and sentences to the Supreme Court of Georgia, which affirmed the Petitioner's convictions and sentences on March 27, 2003. Wright v. State, 276 Ga. 454 (2003). (Appendix 1). The Petitioner's motion for

reconsideration was denied on April 11, 2003. The Petitioner's Application for Extension of Time in Which to File the Petitioner's Petition for Writ of Certiorari was granted by Justice Kennedy on June 4, 2003, thereby extending the time to file the Petition through and including August 25, 2003. (Appendix 2).

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on March 27, 2003. This Court granted the Petitioner an enlargement of time to file the instant Petition through and including August 25, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides in relevant part:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also involves the Fourteenth Amendment to the

Constitution of the United States, which provides in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Late in the morning on June 30, 2000, the body of the Petitioner's friend Richard Hudson was found in the master bedroom of the Petitioner's home. Hudson had fatal gunshot wounds to his torso fired from a .38 caliber revolver owned by the Petitioner's wife. Wright v. State, 276 Ga. 454, 456 (2003). The Petitioner's wife was missing. Id. After law enforcement officials learned that the Petitioner and his wife recently had been having marital problems, they issued bulletins to "be on the lookout" for the Petitioner. Id. Later that afternoon, the police learned that the Petitioner had plans to travel to Florida with a friend named Tyson and went to Tyson's residence, which was located in a neighboring county, in an attempt to locate the Petitioner. Id. Upon arriving at Tyson's residence, police officers observed the Petitioner's car

parked outside the residence. Id. Tyson informed the officers that the Petitioner was inside the residence asleep. The police officers entered the trailer and arrested the Petitioner without a warrant pursuant to a Georgia statute that authorizes warrantless arrests upon probable cause to believe that an act of family violence had been committed by the arrestee. Id. See O.C.G.A. §17-4-20(a).

At the time of the Petitioner's warrantless arrest, the police impounded the Petitioner's vehicle that had been parked outside of Tyson's residence. 276 Ga. at 460. The car was taken to the local police station where an inventory search was conducted. Id. The revolver used to kill Hudson was discovered during this inventory search. Id. The car was later searched pursuant to a warrant. Id. The following day, the body of the Petitioner's wife was recovered near her car which had been driven off a cliff in close proximity to the Petitioner's home. Id.

The Petitioner filed a motion to suppress concerning the warrantless seizure and search of his car, arguing that the officers had no authority to impound the vehicle since it was parked at a private

residence and was of no hindrance to traffic. Id. The trial court denied the Petitioner's motion to suppress and allowed the prosecution to introduce at trial evidence which was seized during the warrantless search of the Petitioner's car. Id. On appeal, the Supreme Court of Georgia affirmed the trial court's denial of the Petitioner's motion to suppress. 276 Ga. at 461-462.

REASON FOR GRANTING THE WRIT

THE DECISION BY THE SUPREME COURT OF GEORGIA IS IN CONFLICT WITH RELEVANT DECISIONS RENDERED BY THIS COURT.

I. INTRODUCTION

In his direct appeal to the Supreme Court of Georgia, the Petitioner contended that the trial court erred in denying his motion to suppress concerning the warrantless seizure and search of his car which he had filed based upon the fact that the car was parked at a private residence and was of no hindrance to traffic. Wright v. State, 276 Ga. 454, 461 (2003).

In rejecting the Petitioner's contentions, the Supreme Court of

Georgia relied upon Georgia precedent and concluded that:

A crucial fact is that the officers had every reason to expect that the detention of Wright would last for some time. Given that fact, it was reasonable for the officers to take the car whenever it was most convenient for them to do so; and presumably it was most convenient immediately following the arrest, when they were at the [trailer] with the car keys.

Wright v. State, 276 Ga. 454, 461 (2003)(citations omitted).

The Supreme Court of Georgia further reasoned:

Here, the vehicle was not at Wright's residence, and those who might tamper with it were not in custody. Rather the car was at the residence of Tyson, Wright's friend who, but for the arrest of Wright, would have accompanied Wright on his trip out of state. Consequently, the police were justified in removing the vehicle.

Wright v. State, 276 Ga. 454, 461 (2003).

The Supreme Court of Georgia's decision is in conflict with relevant decisions of this Court.

II. RELEVANT DECISIONS BY THIS COURT SUPPORT THE PETITIONER'S CONTENTION THAT THE AUTOMOBILE EXCEPTION WAS NOT APPLICABLE IN HIS CASE AND THAT LAW ENFORCEMENT OFFICIALS SHOULD HAVE OBTAINED A WARRANT BEFORE SEIZING AND SEARCHING HIS VEHICLE

This Court in Carroll v. United States, 267 U.S. 132 (1925)

established what is commonly referred to as "the automobile exception" to the Fourth Amendment's warrant requirement. Specifically, this Court noted that:

> ...the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Id. at 153. The capacity for an automobile to be "quickly moved" clearly was the basis of the holding in Carroll. California v. Carney, 471 U.S. 386, 390-391 (1985). This Court has emphasized that the ready mobility of automobiles "creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible." South Dakota v. Opperman, 428 U.S. 364, 367 (1976).

Later cases decided by this Court have emphasized that not only does the ready mobility of automobiles serve as a basis for the automobile exception, but that an individual's reduced expectation of

privacy in an automobile also serves as a basis for the automobile exception. See, e.g., California v. Carney, 471 U.S. 386, 390-391 (1985); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Pennsylvania v. Labron, 518 U.S. 938 (1996). As this Court stated in South Dakota v. Opperman, 428 U.S. 364, 367 (1976), "Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."

An individual's reduced expectation of privacy in automobiles derives from not only the fact that passenger compartments generally are in plain view but also from the government's "pervasive regulation of vehicles capable of traveling on public highways". California v. Carney, 471 U.S. 386, 391 (1985). As this Court has observed, automobiles frequently are taken into custody as a result of vehicle accidents, vehicles becoming disabled or damaged on the highways or streets, and vehicles parked in violation of parking ordinances. South Dakota v. Opperman, 428 U.S. 364, 368-369 (1976). Law enforcement officials must take

custody of vehicles which "jeopardize both the public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge." Id. at 369.

In the Petitioner's case, although the car was "readily mobile" in the sense that someone with a key to the car could have moved it, there was no evidence whatsoever that anyone other than the Petitioner had a key to that car. Furthermore, a law enforcement official easily could have been posted to guard the car at the private residence until a warrant to seize and search the Petitioner's vehicle was obtained. The Petitioner's case completely lacked "circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement [was] impossible." South Dakota v. Opperman, 428 U.S. 364, 367 (1976). As such, the failure of the police to pursue proper warrant procedures in seizing and searching the Petitioner's vehicle cannot be excused by the "ready mobility" of the Petitioner's car.

Furthermore, although the Petitioner is subject to the

government's "pervasive regulation" of his vehicle on the roadways, his car was legally and properly parked at a private residence, a residence in which he was sleeping at the time of his arrest. See California v. Carney, 471 U.S. 386, 391 (1985). As such, his vehicle could not be said to have been "jeopardizing" either "the public safety" or "the efficient movement of vehicular traffic". South Dakota v. Opperman, 428 U.S. 364, 369 (1976). Given the circumstances in the Petitioner's case, it is clear that the automobile exception was not applicable in his case and that law enforcement officials should have obtained a warrant before seizing and searching his vehicle.

As this Court recognized in Coolidge v. New Hampshire, 403 U.S. 443, 464 fn. 20 (1971):

> ...it seems abundantly clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose.

It is respectfully submitted that this Court's opinion in Coolidge v. New Hampshire, 403 U.S. 443 (1971) controls the Petitioner's case. The

vehicle at issue in Coolidge was parked in the driveway of the defendant's house, was not being used for any illegal purpose, and the defendant was in custody. As was the case in Coolidge, the Petitioner's case did not present the situation of an alerted suspect not in custody who was bent on flight, the situation of an arrest on an open highway after a hazardous chase, or the situation of law enforcement officials being concerned that the car contained contraband. See Coolidge, 403 U.S. at 462. There were "no exigent circumstances" that justified "the police in proceeding without a warrant". Id.

The seizure and search of the Petitioner's car was a pretext concealing an investigatory police motive. The Supreme Court of Georgia clearly misapplied this Court's precedent by applying the automobile exception in the Petitioner's case. A fundamental principle of Fourth Amendment analysis is that exceptions to the warrant requirement should be narrowly construed. New York v. Belton, 453 U.S. 454, 464 (1981). The Supreme Court of Georgia in its decision in the Petitioner's case improperly gave priority to the exception instead of the rule.

CONCLUSION

The decision rendered by the Supreme Court of Georgia in the Petitioner's case is in conflict with relevant decisions rendered by this Court. For the reasons stated herein, the Petition for Writ of Certiorari should be granted.

DATED: This 20th day of August, 2003.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael Kennedy McIntyre, do hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the Georgia Supreme Court has been served via United States Mail with proper postage affixed thereto upon:

Thurbert E. Baker
Attorney General
State Judicial Building
40 Capitol Square S.W.
Atlanta, Georgia 30335-1300

Dated: This 20th day of August, 2003.

Michael Kennedy McIntyre

ATTACHMENT 1

Wright v. State
579 S.E.2d 214
Ga.,2003.
March 27, 2003. (Approx. 13 pages)

West Reporter Image (PDF)
3 FCDR 1124

Defendant was convicted in a jury trial in the Superior Court, Dade County, William Ralph Hill, Jr., J., of malice murder, possession of a firearm during the commission of a felony, and concealing the death of another. Defendant appealed. The Supreme Court, Hines, J., held that: (1) evidence was sufficient to support convictions; (2) testimony of wife's friends and daughter regarding statements made by wife before her death met requirements for admission under necessity exception to hearsay rule; (3) any error in admitting series of notes that wife made concerning defendant's conduct subsequent to his filing for divorce was harmless error; (4) evidence regarding defendant's use of illegal drugs was relevant to defendant's motive; and (5) police had probable cause to believe that an act of family violence had been committed, thereby justifying warrantless arrest of defendant. Affirmed.
Sears, P.J., dissented and filed separate opinion in which Fletcher, C.J., joined.
Carley, J., dissented and filed separate opinion in which Fletcher, C.J., and Sears, P.J., joined.

West Headnotes

[1] KeyCite Notes

⇨88 Compounding Offenses
⇨88k3.10 k. Concealing Death. Most Cited Cases

⇨203 Homicide KeyCite Notes
⇨203IX Evidence
⇨203IX(G) Weight and Sufficiency
⇨203k1133 Homicide in General
⇨203k1136 k. Malice. Most Cited Cases

406 Weapons KeyCite Notes

406k17 Criminal Prosecutions

406k17(4) k. Weight and Sufficiency of Evidence. Most Cited Cases

Evidence was sufficient to support defendant's convictions for malice murder, possession of a firearm during the commission of a felony, and concealing the death of another; police found .38 caliber revolver in defendant's vehicle that was proved to have been used to kill one victim, and duffle bag found in room in which defendant was sleeping when taken into custody contained prescription bottle labeled with victim's name, key to victim's car, a disposable camera, and clothes belonging to defendant which were wet, muddy, and bloody.

[2] KeyCite Notes

110 Criminal Law

110XVII Evidence

110XVII(N) Hearsay

110k419 Hearsay in General

110k419(6) k. Statements of Persons Since Deceased. Most Cited Cases

Testimony of wife's friends and daughter regarding statements made by wife before her death met requirements for admission under necessity exception to hearsay rule, in murder prosecution, where each of the witnesses at issue testified that they had confidante-type relationship with wife, statements wife made to witnesses concerning defendant's conduct were not in any material manner contradicted, and trustworthiness of statements was enhanced by fact that wife's statements to witnesses that concerned defendant's behavior were made at times shortly after such behavior occurred. West's Ga.Code Ann. § 24-3-1(b).

[3] KeyCite Notes

110 Criminal Law

110XVII Evidence

110XVII(N) Hearsay

⇨110k419 Hearsay in General
⇨110k419(5) k. Statements of Persons Not Available as Witnesses. Most Cited Cases

For evidence to be admissible under necessity exception to hearsay rule, the declarant must be unavailable and the statement must have particularized guarantees of trustworthiness. West's Ga.Code Ann. § 24-3-1(b).

[4] KeyCite Notes

⇨110 Criminal Law
⇨110XVII Evidence
⇨110XVII(N) Hearsay
⇨110k419 Hearsay in General
⇨110k419(1) k. In General. Most Cited Cases

When determining whether to admit hearsay under necessity exception, circumstances which demonstrate the reliability of hearsay statements will vary depending on the nature of the statement, and therefore, the determination of trustworthiness is inescapably subjective. West's Ga.Code Ann. § 24-3-1(b).

[5] KeyCite Notes

⇨110 Criminal Law
⇨110XVII Evidence
⇨110XVII(N) Hearsay
⇨110k419 Hearsay in General
⇨110k419(1) k. In General. Most Cited Cases

When determining whether to admit hearsay under necessity exception, whether guarantees of trustworthiness exist is determined by the totality of the circumstances, and the trial court exercises its discretion in resolving the issue. West's Ga.Code Ann. § 24-3-1(b).

[6] KeyCite Notes

⇨110 Criminal Law

110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception of Evidence
110k1153(1) k. In General. Most Cited Cases

Trial court's determination on whether to admit hearsay under necessity exception will not be reversed absent an abuse of its discretion. West's Ga.Code Ann. § 24-3-1(b).

[7] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(6) k. Statements of Persons Since Deceased. Most Cited Cases

Uncontradicted statements made to one in whom the deceased declarant placed great confidence and to whom she turned for help with her problems are admissible under the necessity exception. West's Ga.Code Ann. § 24-3-1(b).

[8] KeyCite Notes

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.1 In General
110k1169.1(9) k. Hearsay. Most Cited Cases

Any error in admitting, under necessity exception to hearsay rule, series of notes that wife made concerning defendant's conduct subsequent to his filing for divorce was harmless error, in murder prosecution, where at the pretrial hearing, defendant withdrew any objection to the introduction of hearsay evidence concerning the incident at a motel in which wife saw defendant enter motel with another woman, and wife's note to the effect that defendant threatened that he would kill wife if she brought another man into marital residence was duplicative of other evidence. West's Ga.Code

Ann. § 24-3- 1(b).

[9] KeyCite Notes

⇐110 Criminal Law
⇐110XVII Evidence
⇐110XVII(N) Hearsay
⇐110k419 Hearsay in General
⇐110k419(1) k. In General. Most Cited Cases

There is no bright-line rule barring statements made to one's attorney in a divorce action under the necessity exception to hearsay rule. West's Ga.Code Ann. § 24-3-1(b).

[10] KeyCite Notes

⇐110 Criminal Law
⇐110XVII Evidence
⇐110XVII(N) Hearsay
⇐110k419 Hearsay in General
⇐110k419(1) k. In General. Most Cited Cases

Supreme Court declined to impose bright-line rule barring statements made to one's attorney in a divorce action under the necessity exception to hearsay rule when the declarations were made in writing by one who was a party to a divorce action, with the anticipation that the declarations could prove useful in that action. West's Ga.Code Ann. § 24-3-1(b).

[11] KeyCite Notes

⇐110 Criminal Law
⇐110XVII Evidence
⇐110XVII(F) Other Offenses
⇐110k371 Acts Showing Intent or Malice or Motive
⇐110k371(12) k. Motive. Most Cited Cases

Evidence regarding defendant's use of illegal drugs was relevant to defendant's motive, in murder prosecution, and was thus admissible,

even if it placed defendant's character in issue, where evidence showed that one reason underlying victim's resolve not to reconcile with defendant was defendant's drug use, and the State's theory of the case was that one of defendant's motives in killing victim was his displeasure and frustration over her decision to end their marriage.

[12] KeyCite Notes

⇐110 Criminal Law
⇐110XVII Evidence
⇐110XVII(G) Character of Accused
⇐110k375 Character or Reputation of Accused
⇐110k376 k. In General. Most Cited Cases

Evidence which is relevant to an issue in a case is not rendered inadmissible by the fact that it incidentally puts the defendant's character in issue.

[13] KeyCite Notes

⇐35 Arrest
⇐35II On Criminal Charges
⇐35k63 Officers and Assistants, Arrest Without Warrant
⇐35k63.4 Probable or Reasonable Cause
⇐35k63.4(13) k. Personal Knowledge or Observation in General. Most Cited Cases

Police had probable cause to believe that an act of family violence had been committed, and thus, warrantless arrest of defendant was justified; one victim's body had been found in defendant's house and defendant's wife was missing, and by time of the arrest, police knew that defendant and wife were estranged, that defendant had stalked and threatened wife, that wife had told defendant the day before the arrest that she wished to complete the divorce, and that defendant planned to leave the state. U.S.C.A. Const.Amend. 4; West's Ga.Code Ann. §§ 17-4-20(a), 17-5-1(4).

[14] KeyCite Notes

⇐35 Arrest

⇐35II On Criminal Charges
⇐35k68 Mode of Making Arrest
⇐35k68(6) Intrusion or Entry
⇐35k68(9) k. Entry Without Warrant Permissible. Most Cited Cases

Fact that victim's body had not yet been found and possibility that victim was still alive constituted exigent circumstances authorizing warrantless entry into home of defendant's friend to arrest defendant. U.S.C.A. Const.Amend. 4.

[15] KeyCite Notes

⇐349 Searches and Seizures
⇐349I In General
⇐349k60 Motor Vehicles
⇐349k66 k. Inventory and Impoundment; Time and Place of Search. Most Cited Cases

Immediate impoundment, transfer, and inventory of defendant's vehicle at time of defendant's arrest was not unreasonable within meaning of Fourth Amendment; although vehicle was parked, it was at the home of defendant's friend with whom defendant had planned to leave the State, officers had every reason to expect that detention of defendant would last for some time, and officers had been specifically told to be on the lookout for vehicle, and knew that it was wanted in an investigation in another county. U.S.C.A. Const.Amend. 4.

[16] KeyCite Notes

⇐349 Searches and Seizures
⇐349I In General
⇐349k60 Motor Vehicles
⇐349k66 k. Inventory and Impoundment; Time and Place of Search. Most Cited Cases

Contents of an impounded vehicle are routinely inventoried to protect the property of the owner, protect the officers against claims for lost or stolen property, and protect the police from potential danger. U.S.C.A. Const.Amend. 4.

[17] KeyCite Notes

⇐349 Searches and Seizures
⇐349I In General
⇐349k58 k. Inventory or Booking Search. Most Cited Cases

Police seizure and inventory is not dependent for its validity upon the absolute necessity for the police to take charge of property to preserve it. U.S.C.A. Const.Amend. 4.

[18] KeyCite Notes

⇐349 Searches and Seizures
⇐349I In General
⇐349k60 Motor Vehicles
⇐349k66 k. Inventory and Impoundment; Time and Place of Search. Most Cited Cases

Ultimate test for the validity of police seizure and inventory search of automobile is whether, under the circumstances then confronting the police, their conduct was reasonable within the meaning of the Fourth Amendment. U.S.C.A. Const.Amend. 4.

[19] KeyCite Notes

⇐110 Criminal Law
⇐110XVII Evidence
⇐110XVII(I) Competency in General
⇐110k394 Evidence Wrongfully Obtained
⇐110k394.5 Objections to Evidence
⇐110k394.5(2) k. Persons Entitled to Object. Most Cited Cases

Defendant lacked standing to challenge admissibility of photographs developed from film in disposable camera found in defendant's duffle bag, in murder prosecution; only evidence was that the camera belonged to defendant's brother and had been lent to defendant, of the 20 photographs developed, 19 were taken by defendant's brother, defendant had no proprietary interest in camera, and defendant had

no reasonable expectation of privacy in such film.

[20] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(1) k. In General. Most Cited Cases

Film in disposable camera found in defendant's duffle bag was developed in a reasonable effort to determine the proper owner of the camera and the photographs inside, and thus was admissible in murder prosecution, where approximately a week after the killings, victim's family asked for the return of victim's property, and camera was found in duffle bag with a prescription bottle bearing victim's name and keys to victim's vehicle.

[21] KeyCite Notes

35 Arrest
35II On Criminal Charges
35k71.1 Search
35k71.1(4) Scope of Search
35k71.1(5) k. Particular Objects Searched or Seized. Most Cited Cases

Photographs developed from film in disposable camera found in defendant's duffle bag were fruit of search incident to valid arrest, and thus were admissible in murder prosecution. U.S.C.A. Const.Amend. 4.

[22] KeyCite Notes

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.1 In General

Any error in admitting photograph developed from film in disposable camera found inside defendant's duffle bag, which photograph demonstrated that defendant was in the bedroom with the victims before their deaths, was harmless in murder prosecution, where such information was already before the jury by other means and would have been introduced regardless of whether the motion to suppress the photograph was granted.

***217 *466** Christopher A. Townley, Rossville, for appellant.

Herbert E. Franklin, Jr., Dist. Atty., Thurbert E. Baker, Atty. Gen., Ruth M. Pawlak, Asst. Atty. Gen., for appellee.

***454** HINES, Justice.

Gerald Wayne Wright appeals from his convictions on two counts of malice murder, one count of possession of a firearm during the commission of a felony, and one count of concealing the death of another, all in connection with the death of his wife, Beverly Wright, ***455** and his friend, Richard Hudson. [FN1] For the reasons that follow, we affirm.

FN1. The victims were killed on June 30, 2000. On October 9, 2000, a Dade County grand jury indicted Wright on two counts of malice murder, two counts of felony murder in the commission of aggravated assault, two counts of aggravated assault, one count of possession of a firearm during the commission of a felony, and one count of concealing the death of another. He was tried before a jury on January 29-February 6, 2001, and found guilty on all counts. On February 6, 2001, Wright was sentenced to two consecutive terms of life in prison for the malice murders, to a consecutive term of five years in prison for possession of a firearm during the commission of a felony, and a term of five years in prison for concealing the death of another, to be served concurrently with the two life terms; the aggravated assaults merged with the felony murders, which stood vacated by operation of law. See *Malcolm v. State*, 263 Ga. 369, 371-374(4), (5), 434 S.E.2d 479 (1993). Wright moved for a new trial on March 2, 2001, which was denied on March 7, 2002. Wright filed a notice of appeal on April 5, 2002. His appeal was docketed in this Court on May 20, 2002, and submitted for decision on July 15, 2002.

Construed to support the verdicts, the evidence showed that Gerald

Wayne Wright ("Wright") and Beverly Wright ("Beverly") resided in Dade County and had been married for almost 25 years when they separated in March of 2000; Wright left the house. Soon thereafter Wright filed for divorce. There were attempts to reconcile, but no positive resolution. In mid-June, 2000, Beverly saw Wright enter the Villager Motel with another woman. Parked outside the motel, Beverly, using her cellular telephone, called Wright on his cellular telephone and asked if the couple would like to exit the motel for a photograph. Wright left the room, still speaking on his telephone, and approached Beverly. She drove away and he drove after her, eventually forcing her off the road. He walked up to her car and demanded the camera on the front seat. She refused; he went to his car for a metal object and threatened to break her window. Beverly lowered the window and Wright reached in over her and took the camera. Beverly's telephone call to 911 about the incident was recorded.

On June 29, 2000, in a final attempt to save the relationship, Wright and Beverly went to a marriage counselor. Shortly after entering the session, Beverly stated that she had no desire to reconcile, and left. That afternoon, Wright went to Beverly and told her that if she brought a man into "his" house, he would kill her. That evening, he asked his friend Richard Hudson to talk with Beverly and try ***218** to persuade her to take Wright back, a role in which Hudson had previously served. Late that night, Wright went to the marital home where Beverly continued to reside, and discussed the matter with Hudson and Beverly. Wright left to get some cigarettes. Upon returning, he discovered Hudson and Beverly lying on the bed in the master bedroom. Wright had a disposable camera and took a photograph of the two in what Wright described as an embrace in which ***456** Hudson appeared to be consoling Beverly. Hudson and Beverly had recently developed a relationship with one another beyond their connection through Wright. An argument ensued, Wright hit Hudson over the head with a flashlight several times, shot him twice, and then forced Beverly to leave the house with him.

Late in the morning of June 30, 2000 after not being able to reach her mother by telephone, the couple's daughter, Jennifer, drove to her mother's home. She discovered Hudson's body on the floor of the master bedroom. At 11:23 a.m., Jennifer called the police. There were smears of blood in the garage. Hudson had fatal gunshot wounds to his torso fired from a .38 caliber Taurus handgun owned by Beverly, which she kept in the headboard of her bed. By 1:46 p.m., investigators had learned of the marital problems, had determined that the .38 pistol was missing, and had issued bulletins to "be on the lookout" for Wright and Beverly, his car, and Beverly's car; it was stated that Wright should be considered armed and dangerous. Investigation revealed that Wright planned to go to Florida with a

friend named Tyson. At approximately 4:40 p.m. on June 30, 2000, Wright's car was discovered outside Tyson's trailer in neighboring Walker County. Officers arrived, and Tyson informed them that Wright was asleep inside, alone. The police entered the trailer and took Wright into custody in the bedroom. In his car was a .38 caliber revolver that was proved to have been used to kill Hudson. Taken from the bedroom was a duffle bag in which there was a prescription bottle labeled with Hudson's name, the key to Hudson's car, a disposable camera, and clothes belonging to Wright which were wet, muddy, and bloody.
Early in the afternoon of June 30, 2000, it was discovered that a car had gone off Lookout Mountain and was in the trees 75 feet below a cliff edge. No one was inside the car. Recovery efforts began at approximately 8:00 p.m., but were unsuccessful until the next day. The car was determined to be Beverly's and her body was found near it. She had suffered numerous blows to the head with a blunt object; her skull was "bashed in." Some injuries to her torso occurred after her death; her injuries were not consistent with her being alive as the car went over the cliff. The location of the car was near the Wright's marital home in the valley below. The home of Wright's brother, where Wright had been staying since leaving the marital home, was 200 or 300 yards from the marital home.
Wright testified that: Beverly shot Hudson; Wright attempted to flee but Beverly caught him and forced him to the garage floor; she forced Wright at gunpoint to drive to the top of Lookout Mountain; she forcibly committed oral sodomy on him after pinning his hands in the window; they struggled over the pistol; Beverly was struck in the head several times but prevailed in the struggle; at gunpoint, she ***457** forced Wright into the front passenger seat of the car; she got into the driver's seat and attempted to drive the car off the cliff with Wright inside; Wright managed to roll out of the car as it was going over the edge of the cliff, grabbing the pistol as he went; Beverly remained in the car; Wright then walked to his brother's home, where he showered, changed, and put the items he thought might be evidence into a duffle bag and left his brother's home; he did not know whether Hudson or Beverly remained alive; he did not call an ambulance or the police, but did attempt to call his attorney, who was out of town; [FN2] he drove to Tyson's home and went to sleep. During pre-trial incarceration, Wright wrote a letter ****219** to a friend reciting substantially the same version of events.

FN2. Between 9:17 a.m. and 10:46 a.m. on June 30, 2000, Wright drove through a State Patrol driver's license checkpoint on a road between his brother's home and Tyson's. He did not report any information concerning Hudson or Beverly to the trooper who checked his license.

[1] 1. The evidence was sufficient to enable a rational trier of fact to find Wright guilty beyond a reasonable doubt of the crimes for which he was convicted. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

[2] [3] [4] [5] [6] 2. The trial court allowed certain witnesses to testify as to statements made by Beverly before her death under the necessity exception to the hearsay exclusion rule. OCGA § 24-3-1(b). For such testimony to be admissible, the declarant must be unavailable and the statement must have particularized guarantees of trustworthiness. *Abraha v. State*, 271 Ga. 309, 313(2), 518 S.E.2d 894 (1999). "[T]he circumstances '[which demonstrate] the reliability of (hearsay) statements will vary depending on the nature of the statements, [and therefore,] the determination of trustworthiness is inescapably subjective." *Gissendaner v. State*, 272 Ga. 704, 710-711(6), 532 S.E.2d 677 (2000). Whether guarantees of trustworthiness exist is determined by the totality of the circumstances, and the trial court exercises its discretion in resolving the issue. *McCulley v. State*, 273 Ga. 40, 41 42(2)(a), 537 S.E.2d 340 (2000). The trial court's determination will not be reversed absent an abuse of its discretion. *Gissendaner*, supra.

[7] It must be noted that Wright has not specified the statements he contends were both improperly admitted and harmful to him, other than those "concerning bad acts or misconduct" on Wright's part, during the separation. [FN3] Apparently, Wright is alleging reversible error based on the testimony of certain of Beverly's friends and Jennifer Wright. Although Wright contends that the fact that the witnesses ***458** were Beverly's daughter and Beverly's friends shows bias on their part, [FN4] the "[u]ncontradicted statements made to one in whom the deceased declarant placed great confidence and to whom she turned for help with her problems are admissible under the necessity exception." *Ward v. State*, 271 Ga. 648, 650(2), 520 S.E.2d 205 (1999). Each of the witnesses at issue testified that she had such a relationship with Beverly, that she and Beverly regularly discussed matters concerning Beverly's relationship with Wright, and that nothing Beverly had ever told her had been recanted. All but one testified that she was sufficiently intimate with Beverly to know of Beverly's use of illegal drugs; the other witness was not asked if she knew of that history.

FN3. A pretrial hearing was held on Wright's motion to "Make a Determination of Indicia of Reliability," at which the focus was Beverly's relationship to the witnesses called at that hearing. Wright made no objection at trial to any specific testimony.

FN4. This argument ignores the fact that Beverly's daughter is also Wright's daughter.

Wright contends that all of these witnesses were not shown to be confidantes of Beverly because the true nature of Beverly's relationship with Hudson was not revealed to them; to most of these witnesses, Beverly stated that she and Hudson were merely friends who went to dinner on occasion, although Jennifer Wright testified that Beverly and Hudson had become close and had begun "dating" in the last two weeks before their deaths, and that she had seen Beverly and Hudson kissing in a romantic manner "less than a week" before their deaths. But, the true nature of the relationship between Beverly and Hudson was not established beyond question, and though there was some evidence that Beverly and Hudson had spent a night in the same house, other evidence showed that Hudson was sexually impotent, a fact Beverly had shared with at least some of the witnesses. Even assuming a romantic relationship, the only evidence showed that it existed for a short period of time immediately preceding the deaths of Hudson and Beverly, and any failure of Beverly's to tell all the challenged witnesses that she and Hudson were romantically involved did not prevent the court, in the exercise of its discretion, from determining that these witnesses were those "in whom the deceased declarant placed great confidence and to whom she turned for help with her problems." Id. Further, the statements Beverly made to these witnesses concerning Wright's conduct ***220** were not in any material manner contradicted. Id. And the trustworthiness of the statements is enhanced by the fact that Beverly's statements to the witnesses that concerned Wright's behavior were made at times shortly after that behavior occurred. See *McKissick v. State*, 263 Ga. 188, 189(3), 429 S.E.2d 655 (1993) (see *Clark v. State*, 271 Ga. 6, 10(5), 515 S.E.2d 155 (1999), stating that *McKissick* was implicitly overruled on other grounds in *Chapel v. State*, 270 Ga. 151, 155(4), 510 S.E.2d 802 (1998)).

[8] [9] [10] ***459** The trial court also admitted into evidence under the necessity exception a series of notes that Beverly made concerning Wright's conduct subsequent to his filing for divorce.

Wright contends that the notes were made in contemplation of the divorce litigation and are inherently untrustworthy, but there was testimony that Beverly made the notes because if " something happened to her, she wanted it on paper." Further, there is no bright-line rule barring statements made to one's attorney in a divorce action under the necessity exception. *Dix v. State*, 267 Ga. 429, 431(2), 479 S.E.2d 739 (1997). And we see no reason to impose one where the declarations are made in writing by one who is a party to a divorce action, with the anticipation that the declarations may prove useful in that action. Most of the statements in the notes were corroborated by other evidence. See *Perkins v. State*, 269 Ga. 791, 795-796(4), 505 S.E.2d 16 (1998). Further, even if the notes were inadmissible, their introduction was harmless. At the pretrial hearing, Wright withdrew any objection to the introduction of hearsay evidence concerning the incident at the Villager Motel. [FN5] Finally, the note to the effect that, on the afternoon of June 29, Wright threatened that he would kill Beverly if she brought another man into the marital residence was duplicative of other evidence.

FN5. This withdrawal apparently included any objection concerning Wright's following Beverly from the motel in his car, forcing her off the road, threatening to break the window of Beverly's car, and taking a camera from Beverly's car. No argument was made concerning this incident, and Wright conceded "the Villager motel" had sufficient indicia of reliability, an apparent reference to the audiotape of Beverly's roadside call by cellular telephone to 911, and her recounting of the incident upon arriving at her workplace immediately afterward.

[11] [12] 3. Wright also complains that evidence about his use of illegal drugs was wrongly admitted. "Evidence which is relevant to an issue in a case is not rendered inadmissible by the fact that it incidentally puts the defendant's character in issue. [Cit.]" *Johnson v. State*, 260 Ga. 457, 458(2), 396 S.E.2d 888 (1990). Evidence showed that one reason underlying Beverly's resolve not to reconcile with Wright was Wright's drug use, and the State's theory of the case was that one of Wright's motives in killing Beverly was his displeasure and frustration over her decision to end their marriage. See *Ware v. State*, 273 Ga. 16, 17(2), 537 S.E.2d 657 (2000); *Hall v. State*, 264 Ga. 85, 86(2), 441 S.E.2d 245 (1994). Although Wright attempted to refute the State's theory of the case and show that he did not have the motive ascribed to him, that does not render the evidence irrelevant.

[13] 4. When Wright was arrested, a duffle bag was on the floor of the bedroom in which the arrest took place. The officers asked a resident of the trailer if Wright had any belongings there, and were told that the duffle bag was his; the officers removed the duffle bag and took it ***460*** with them. Wright urges that this was an invalid seizure, arguing that the officers did not have authority to arrest him without a warrant and no authority to take the bag as incident to such an arrest.

[14] First, the warrantless arrest of Wright was authorized under OCGA § 17-4-20(a); the police had probable cause to believe that an act of family violence had been committed. Hudson's body had been found in Wright's house, and Beverly was missing. By the time of the arrest, police knew that: Wright and Beverly were estranged; Wright had stalked and threatened Beverly; Beverly had told Wright the day before the arrest that she wished to complete the divorce; the night before, Wright had stated his intention to visit Hudson; Wright planned to leave the state with Tyson; and Wright was in Tyson's home, allegedly asleep. Tyson told the police that Wright was alone in the home, but they ***221*** had no independent knowledge of this, and Beverly remained missing. There is no error in the trial court's conclusion that Wright's warrantless arrest was justified under OCGA § 17-4-20(a), as the police had probable cause to believe that an act of family violence had occurred. Beverly's body had not yet been found, and the possibility that she was still alive was an exigent circumstance authorizing the entry into Tyson's home to arrest Wright. Compare *State v. Peterson*, 273 Ga. 657, 660, 543 S.E.2d 692 (2001).
Under OCGA § 17-5-1(a)(4),
When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area within the person's immediate presence for the purpose of: ... (4) Discovering or seizing any instruments, articles, or things which are being used or which may have been used in the commission of the crime for which the person has been arrested.
Wright was on the bed and the duffle bag was on the floor of the bedroom. It was in his "immediate presence" within the meaning of OCGA § 17-5-1(4), and reasonably could be seized and searched for items used in the commission of the crime.

[15] 5. At the time of Wright's arrest, Walker County deputies impounded his car. It was taken to the Rossville Police Station where an inventory of its contents was made, and the weapon used to kill

Hudson was first discovered. The car was later searched pursuant to a warrant. Wright contends that the trial court should have suppressed the warrantless search and seizure of the car.

[16] "The contents of an impounded vehicle are routinely inventoried to protect the property of the owner, protect the officers against claims for lost or stolen property, and protect the police from potential danger." *Goodman v. State*, 255 Ga. 226, 229(13), 336 S.E.2d 757 (1985). The testimony was that the officers involved conducted inventory ***461** searches as a matter of procedure for just such reasons. Nonetheless, Wright argues that the officers had no authority to impound the vehicle, as it was parked at a private residence and was of no hindrance to traffic.

[17] [18] "It is well established that a police seizure and inventory is not dependent for its validity upon the absolute necessity for the police to take charge of property to preserve it. They are permitted to take charge of property under broader circumstances than that." *Mooney v. State*, 243 Ga. 373, 375(1), 254 S.E.2d 337 (1979). Here the car was parked, but at the home of a friend of Wright's, with whom Wright had planned to leave the state. The officers were not required to trust that the car would be untouched if left at the scene. "*[T]he ultimate test for the validity of the police's conduct is whether, under the circumstances then confronting the police, their conduct was reasonable within the meaning of the Fourth Amendment.*" (Emphasis in original.) *Jones v. State*, 187 Ga.App. 421, 424, 370 S.E.2d 784 (1988). "A crucial fact is that the officers had every reason to expect that the detention of [Wright] would last [for some time]. Given that fact, it was reasonable for the officers to take the car whenever it was most convenient for them to do so; and presumably it was most convenient immediately following the arrest, when they were at the [trailer] with the car keys." *Mooney*, supra at 379, 254 S.E.2d 337, citing with approval *United States v. Gravitt*, 484 F.2d 375, 380 n. 5 (5th Cir.1973) cert. den., 414 U.S. 1135, 94 S.Ct. 879, 38 L.Ed.2d 761 (1974). The Walker County officers had been specifically told to be on the lookout for this vehicle, and knew that it was wanted in an investigation in another county. Under these circumstances, it was not unreasonable to immediately impound, transfer, and inventory the car. Id.

This case is not controlled by *State v. Lejeune*, 276 Ga. 179, 576 S.E.2d 888 (2003), in which there was no evidence that the search was a valid inventory search, or a lawful search pursuant to arrest. [FN6] Id. at 182(2), 576 S.E.2d 888. The officers here were faced with a different set of circumstances than faced by those in *Lejeune*. There

the vehicle was parked at Lejeune's **222 residence, and the police had in custody both Lejeune and his roommate. [FN7] Here, the vehicle was not at Wright's residence, and those who might tamper with it were not in custody. Rather the car was at the residence of Tyson, Wright's friend who, but for the arrest of Wright, would have accompanied Wright on his *462 trip out of the state. Consequently, the police were justified in removing the vehicle. While impounding the car may have been unreasonable in *Lejeune*, it was reasonable here.

FN6. The officers in *Lejeune* proceeded under a warrant that later proved to be invalid.

FN7. What the Lejeune opinion refers to as "the suspect and his only alleged cohort."

[19] 6. Finally, Wright contends that the trial court should have suppressed the photographs developed from the film in the disposable camera found in his duffle bag. The court specifically found that Wright lacked standing to raise this challenge as it was his brother's camera. See *Burgeson v. State*, 267 Ga. 102, 105, (3)(b), 475 S.E.2d 580 (1996); *State v. Harris*, 236 Ga.App. 525, 529(3), 513 S.E.2d 1 (1999). The only evidence was that the camera belonged to Wright's brother and had been lent to Wright. Of the 20 photographs developed, 19 were taken by Wright's brother. Wright not only had no proprietary interest in the camera, but could have no reasonable expectation of privacy in film in a disposable camera that had been borrowed from another, and which would have to be returned to the owner upon demand. In this regard, the disposable camera differs from a borrowed automobile. Compare *Hall v. State*, 223 Ga.App. 211(1), 477 S.E.2d 364 (1996). The automobile can be returned to its owner in the same condition as it was when borrowed, after the removal of any private possessions therein, while the camera cannot; the film must remain in it until all photographs are developed.

[20] Further, the photographs were admissible under the same rationale as that authorizing an inventory search; the police must be able to protect themselves "against claims for lost or stolen property." *Goodman*, supra. Approximately a week after the killings, Hudson's family asked for the return of his property. The camera was found in the duffle bag with a prescription bottle bearing his name and the keys to Hudson's car. The film was developed in a reasonable effort to

determine the proper owner of the camera and the photographs inside. See *Waine v. State*, 37 Md.App. 222, 377 A.2d 509, 517 (1977).

[21] Additionally, "the film was the fruit of a search incident to the arrest, the arrest was made with probable cause and therefore the search of the [duffle bag found in Wright's immediate presence], including any containers therein, was legal." *Gosdin v. State*, 176 Ga.App. 381, 383(1), 336 S.E.2d 261 (1985). Development of the film was simply an examination of the camera (i.e., container) found incident to the arrest, and is akin to a laboratory test on any lawfully seized object. See *State v. Riedel*, 656 N.W.2d 789, 793 (Wis.Ct.App. 2002).

[22] In any event, the admission into evidence of the final photograph in the camera, if error, was harmless. The photograph, and the logical inferences drawn therefrom, show that Wright was in the bedroom, in the company of the victims, before their deaths. That information was already before the jury by other means, and would have been introduced regardless of whether the motion to suppress the ***463*** photograph was granted. In a letter Wright wrote to a friend a few days after his arrest, he related that he came into the bedroom and found Beverly and Hudson, although he did not mention a camera or the photograph in the letter. [FN8] Despite Wright's request in the letter that the recipient destroy it, she did not do so. At the time Wright wrote the letter, the film had not been developed, and the letter is in no sense a product of the police's act of developing the film, nor was its introduction dependent upon the development of the film. See *Duncan v. State*, 259 Ga. 278, 282(2), 379 S.E.2d 507 (1989). As separate evidence showed that Wright was in the bedroom when Hudson was shot, the introduction of the photograph was, if error, harmless. *Satterfield v. State*, 256 Ga. 593, 597(4), 351 S.E.2d 625 (1987).

FN8. At trial, Wright testified that he had a camera and took the photograph.

Judgments affirmed.

****223*** All the Justices concur, except FLETCHER, C.J., SEARS, P.J., and CARLEY, J., who dissent.

FLETCHER, Chief Justice, dissenting.

I dissent because the trial court erred in admitting the hearsay statements of Beverly Wright and denying the defendant's motion to suppress.
In *Yancey v. State,* [FN9] we reiterated that the party presenting hearsay evidence under the necessity exception must prove that the person who made the out-of-court statement is unavailable to testify at trial, the statement is relevant to a material fact, the statement is more probative on that fact than other available evidence, and the statement shows particular guarantees of trustworthiness. Here, Beverly Wright's out-of-court statements to co-workers Mahalah Smith, Susie McSpadden, and Regina Whitlow were inadmissible since other more probative evidence was introduced at trial about the defendant's drug use, the couple's marital problems, the extramarital affair between the two victims, and the incident when the defendant ran his wife off the road. Mrs. Wright's statements to Rebecca Parker, whom she had known just a year, should not have been admitted because they lacked trustworthiness. Finally, as Justice Sears points out, Mrs. Wright's journal entries about her husband's conduct after he filed for divorce were written to support her position in the divorce action and, therefore, were not made under circumstances demonstrating particular guarantees of trustworthiness. [FN10]

FN9. 275 Ga. 550, 570 S.E.2d 269 (2002).

FN10. See *Slakman v. State,* 272 Ga. 662, 533 S.E.2d 383 (2000); *Dix v. State,* 267 Ga. 429, 479 S.E.2d 739 (1997).

I also join Justice Carley's dissent because the warrantless search of Wright's automobile violated his Fourth Amendment right ***464** against unreasonable searches and seizures. [FN11]

FN11. See *Lejeune v. State,* 276 Ga. 179, 576 S.E.2d 888 (2003).

I am authorized to state that Presiding Justice SEARS join in this dissent.

SEARS, Justice, dissenting.
For the reasons explained in Justice Carley's dissenting opinion, I respectfully dissent to the majority's affirmance of this appeal. I write separately, however, to note that the majority's analysis in Division 2 regarding the trial court's decision to admit the victim's personal journal entries regarding her upcoming divorce litigation is in conflict

with this Court's precedent governing the admissibility of out-of-court statements under the necessity exception to the rule against hearsay. First, the majority improperly treats other evidence corroborating the journal's contents as indicators of the journal's reliability. [FN12] This Court has recently held that evidence corroborating out-of-court statements does not indicate reliability but rather is considered only when determining whether any error in admitting the statements was harmless. [FN13]

FN12. Op. at 458-459, 579 S.E.2d 214.

FN13. *Yancey v. State*, 275 Ga. 550, 555, 570 S.E.2d 269 (2002).

Moreover, there is nothing inherent in the nature of statements made in anticipation of or preparation for divorce litigation that suggests they will necessarily be truthful. [FN14] Spouses who, as here, face the likelihood of divorce may often be inclined to make self-serving statements that tend to portray the marital relationship in an inaccurate or biased light. [FN15] Considering the totality of the circumstances in this case, I can discern no strong indicators of reliability that militated in favor of the journal entries' admission into evidence. To the contrary, it appears that the hearsay declarant was under great stress due to her relationship and also was using illicit drugs. There being no real indicia of reliability associated with the journal entries, I believe that the trial court erred in admitting them under the necessity exception.

FN14. *Dix v. State*, 267 Ga. 429, 431, 479 S.E.2d 739 (1997).

FN15. Id.

I am authorized to state that Chief Justice FLETCHER joins in this dissent.

**224 CARLEY, Justice, dissenting.

I dissent to Division 5 of the majority opinion and to the judgment of affirmance. In my opinion, *State v. Lejeune*, 276 Ga. 179, 182(2) 576 S.E.2d 888 (2003) is not distinguishable. In both *Lejeune* and the instant case, there was no justification for the impoundment of *465 the defendant's vehicle.

The majority correctly avoids justifying the seizure under the

automobile exception or as incident to the arrest. See *State v. Lejeune*, supra. In the absence of an exception to the warrant requirement, police officers are not authorized to conduct a warrantless investigatory search under the guise of an inventory search. *Williams v. State*, 157 Ga.App. 476, 480(3), 277 S.E.2d 923 (1981); *Gaston v. State*, 155 Ga.App. 337, 339, 270 S.E.2d 877 (1980). See also *State v. Evans*, 181 Ga.App. 422, 423(2), 352 S.E.2d 599 (1986). "[T]he police may not make a pretextual inventory search of an arrestee's automobile in violation of his constitutionally-protected privacy rights. [Cits.]" *Fortson v. State*, 262 Ga. 3, 4(1), 412 S.E.2d 833 (1992).

"The state may inventory the contents of a car that has been *lawfully* impounded." (Emphasis supplied.) *Sams v. State*, 265 Ga. 534, 535(3), 459 S.E.2d 551 (1995). "Justification of an inventory search is thus premised upon the validity of the impoundment. [Cit.]" *State v. Lowe*, 224 Ga.App. 228, 229, 480 S.E.2d 611 (1997). The police may not use an impoundment as a medium to search for contraband or other evidence of a crime. *State v. Lowe*, supra at 229, 480 S.E.2d 611.

Even though the decision to seize and inventory need not be based upon the "absolute necessity" to do so, unless the rationale for an inventory search inheres in the decision to seize and inventory, the impoundment itself may be "unreasonable" and the resulting inventory search invalid. [Cit.]

State v. Thomason, 153 Ga.App. 345, 349(3), 265 S.E.2d 312 (1980). In both this case and *Lejeune*, "the officer[s] had no authority to impound the [vehicle] because [it] was legally parked and not creating a traffic hazard. [Cit.]" *Sams v. State*, supra at 535-536(3), 459 S.E.2d 551. Furthermore, neither Wright nor the majority has presented any other non- investigatory justification for the impoundment of his car. The vehicle was not stopped by police on a highway, but was parked at the residential property of a friend, and there is no evidence that the car was connected to the arrest of Wright, that his ownership was in doubt, that he was consulted regarding alternate disposition of the vehicle, that it had an invalid tag, or that his friend requested its removal. *Mitchell v. State*, 178 Ga.App. 244, 245- 246(3), 342 S.E.2d 738 (1986); *Strobhert v. State*, 165 Ga.App. 515, 516, 301 S.E.2d 681 (1983); *State v. Darabaris*, 159 Ga.App. 121, 282 S.E.2d 744 (1981). See also 2 LaFave, Israel & King, Criminal Procedure § 3.7(d), p. 214 (2nd ed.1999). Compare *State v. Lowe*, supra at 230-231, 480 S.E.2d 611.

The fact that the detention of Wright was expected to last for some time was not a valid reason for impoundment, because there was no evidence that the car was parked at a business or other location ***466** where it would not be allowed to remain for more than a short time.

See *State v. Lowe*, supra at 231, 480 S.E.2d 611; *Fitzgerald v. State*, 201 Ga.App. 361, 364(3), 411 S.E.2d 102 (1991). Compare *Mooney v. State*, 243 Ga. 373, 379(1), 254 S.E.2d 337 (1979); *United States v. Gravitt*, 484 F.2d 375, 380, fn. 5 (5th Cir.1973). Nor can the impoundment be justified by the possibility that Wright's friend may tamper with evidence in the car. Such a motive is clearly investigatory in nature. Thus, contrary to the assertion of the majority, *Lejeune* is not distinguishable on this basis. The appropriate action of the investigating officers, if they believed that they had probable cause to search Wright's car, would have been to accept the offer of Walker County deputies to secure the vehicle until a search warrant was obtained. Where law enforcement officers conduct a warrantless investigatory search under the guise of an inventory search, "we should 'refuse to allow such apparent subterfuges to erode the strictures of the fourth amendment.' [Cit.]" *Williams v. State*, supra at 480, 277 S.E.2d 923.

"In short, there was no showing that the impoundment of the car was reasonably necessary. [Cits.]" ***225** *Mitchell v. State*, supra at 246(3), 342 S.E.2d 738. The trial court should have granted the motion to suppress the evidence obtained as a result of the warrantless seizure and search of the automobile, and the majority incorrectly affirms the denial of that motion.

I am authorized to state that Chief Justice FLETCHER and Presiding Justice SEARS join in this dissent.

Ga.,2003.

Wright v. State

579 S.E.2d 214, 276 Ga. 454, 3 FCDR 1124

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ATTACHMENT 2

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WILLIAM K. SUTER
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479-3011

June 4, 2003

Mr. Michael Kennedy McIntyre
507 The Grant Building
44 Broad Street, N.W.
Atlanta, GA 30303

Re: Gerald Wright
v. Georgia
Application No. 02A1037

Dear Mr. McIntyre:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on June 4, 2003, extended the time to and including August 25, 2003.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

Jeffrey D. Atkins
Assistant Clerk